IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

THURSDAY, THE 1ST NOVEMBER 2007 / 10TH KARTHIKA 1929

WP(C).No. 32127 of 2007(Y)

CC.32/2003 of J.M.F.C.IV (MOBILE),TVM.
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PETITIONER:
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1. SOUTHERN INVESTMENTS PRIVATE LIMITED
   65, MONTIETH COURT, MONTIETH ROAD,
   EGMORE CHENNAI, HAVING BRANCH AT TRIVANDRUM,
   REPRESENTED BY AJITH THOMAS ABRAHAM.

2. ABRAHAM THOMAS, MANAGING DIRECTOR,
   SOUTHERN RAILWAY PRIVATE LIMITED 65,
   MONTIETH COURT, MONTIETH ROAD,
   EGMORE CHENNAI.

3. AJITH THOMAS, DIRECTOR,
   SOUTHERN INVESTMENTS PRIVATE LIMITED 65,
   MONTIETH COURT, MONTIETH ROAD,
   EGMORE CHENNAI.

BY ADV. SRI.K.L.NARASIMHAN

RESPONDENTS:
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1. STATE OF KERALA, REPRESENTED BY ITS
   STATE PROSECUTOR, HIGH COURT BUILDINGS,
   ERNAKULAM.

2. HUDCO, KSHB COMMERCIAL CUM RESIDENTIAL
   BUILDING, PATTOM, THIRUVANANTHAPURAM,
   REPRESENTED BY ITS ASSISTANT LAW OFFICER,
   HUDCO REGIONAL OFFICE,
   THIRUVANANTHAPURAM.

BY G.P. SRI. M.S. BREEZ.

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 01/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

R. BASANT, J.

W.P.(c) No. 32127 OF 2007

Dated this the 1st day of November, 2007

JUDGMENT

The petitioners are the accused in a prosecution under Sec.138 of the Negotiable Instruments Act. The prosecution was initiated as early as in 2003 as can be seen from the number assigned to the case (C.C.No.32/03). This prosecution under Sec.138 of the Negotiable Instruments Act continues even now. The matter has reached the stage of defence evidence. The petitioners had filed two defence lists. Both were filed before the matter reached the stage of defence evidence.

2. The learned Magistrate permitted the petitioners to examine the witnesses shown in the first list; but refused to issue summons to the witnesses shown in the second schedule.

The learned Magistrate, after considering the claim, had refused the prayer in para-3 of the order which reads as follows:

> "3. I have carefully perused the rival contentions and the relevant records. It is admitted case of the parties that the complainant Hudco advanced more than four crores by way of loan to the accused company to complete their projects at Edapalli, Kochi. It is also admitted that there was agreement between the parties having amended on different occasions and also the issuance of the cheques involved in this case by the accused company. The defence version is that there was violation of the terms of the agreement by the complainant and also that the cheques involved in the case are given only as part of documentation and not as a mode of discharging the liability. It is pertinent to note that volumes of documents produced by the accused were marked in the above case and almost all material papers of correspondence and transaction between the parties are

> produced. Though seven officials were cited as witnesses and numerous documents were sought to be summoned, there is absolutely nothing in the second witness list as to the point to be proved by the examination of additional witnesses and by the production of the additional documents. There are three other cases in the series of the year 2003 is pending before this court and reckoning the facts and circumstance I am of the view that the second witness list is filed only to protract the proceedings and that witness and the documents sought to be summoned are not relevant to prove the defence case or to disprove the case of the complainant."

3. It will be apposite in this context to advert to the vital skeletal facts. The signature in the cheque is admitted. All entries in the cheque are also not disputed. The only contention is that the cheque handed over not with the intention of presenting the same for encashment; but only as a part of documentation.

4. The learned counsel for the petitioners contends that the learned Magistrate erred grossly in rejecting the application under Sec.254(2) of the Cr.P.C. This has denied to the petitioners. Their right to adduce evidence in support of their case. In a prosecution under Sec.138 of the Negotiable Instruments Act the accused has the burden to rebut the presumption under Sec.139 of the Negotiable Instruments Act and therefore the rejection of the prayer to adduce evidence would result in failure and miscarriage of justice. It is, in these circumstances, prayed that the impugned order may be set aside and there may be a direction to the learned Magistrate to summon the witnesses as shown in the second witness schedule filed by the petitioners i.e., Ext.P2.

5. I have considered all the relevant inputs. Both schedules are seen to have been filed prior to 313 stage and, in these circumstances, it may not correct to take the view that either witness schedule is filed belated. The rejection on the ground of the second schedule of witnesses having been filed belatedly cannot be justified.

6. The learned counsel for the petitioners was requested

to explain how the summoning of these witnesses are necessary. The learned Magistrate has taken the view that the discretion under Sec.254(2) of the Cr.P.C. need not be invoked in favour of the petitioners.

7. I must, in this context, alertly remind myself of the nature, quality and contours of the jurisdiction of this Court under Sec.482 of the Cr.P.C. The impugned order is, without dispute, only an interlocutory order. The law frowns upon the attempt to raise challenge against interlocutory orders during the pendency of the proceedings. Ordinarily and normally, a party wanting to assail the interlocutory order must wait till the proceedings are over to challenge such an interlocutory order. This policy of law is clearly reflected in Sec.397(2) of the Cr.P.C. which proscribes challenge against interlocutory orders during the pendency of the proceedings. Not that this Court will not have jurisdiction in an appropriate case to invoke the extraordinary inherent jurisdiction under Sec.482 of the Cr.P.C. to interfere even with an order like the instant one; but certainly sufficient, cogent, convincing and exceptional reasons must be shown to exist to justify the invocation of such powers. Such

powers, it has repeatedly been held, are not to be invoked as a matter of course. Has there been failure of justice? Is there miscarriage of justice? Is there abuse of the process of the court? These are the questions which will have to be considered.

8. I shall not delve deeper into the nature of the demand and the type of witnesses and the nature of documents that are sought to be summoned. Suffice it to say that I have gone through the second witness schedule in detail. I take note of the fact that the petitioners had examined the Managing Director of the petitioner - establishment himself as a witness and the prayer now is to summon the officials of the petitioners' own establishment to prove the documents. Their attempt does not inspire confidence. Similarly, the nature of the documents which are sought to be summoned from the complainant also does not at all contra indicate the correctness of the conclusion of the learned Magistrate that the attempt appears to be to delay and protract the proceedings.

9. I am, in these circumstances, satisfied that the impugned order does not warrant interference. Precedents

have been cited about the manner in which the discretion has to be exercised under Sec.254(2) of the Cr.P.C. The position is well settled that the discretion under Sec.254(2) of the Cr.P.C. is wider in a summons trial than in warrant trial and sessions trial. The decision in **Francis v. Pradeep** (2004 (2) KLT 1080) has adverted to the question in detail.

10. This writ petition is, in these circumstances, dismissed. I may hasten to observe that the dismissal of this petition will not in any way fetter the rights of the petitioners to challenge the impugned order (if that be necessary) along with the final order to be passed in the prosecution by the learned Magistrate. No observation made here is intended to fetter the rights of the petitioners to stake such challenge. I have only chosen to hold that the impugned order does not warrant interference by invoking the inherent jurisdiction under Sec.482 of the Cr.P.C.

(R. BASANT, JUDGE)

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